

CIVIL REVISION APPLICATION No 1372 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

CHANDULAL NATHALAL CHUDASMA

Versus

SAVJIBHAI BECHARBHAI

Appearance:

MR RC KAKKAD for Petitioners

MR KAVINA for NAVIN K PAHWA for Respondent No. 1

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 28/06/2000

ORAL JUDGEMENT

1. Heard Mr.R.C.Kakkad, learned advocate for the revision-petitioners and Mr.Kavina, learned advocate for and on behalf of Mr.N.K.Pahwa, learned advocate for the revision opponent(caveator).

2. This is a Civil Revision Application filed under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereinafter referred to as 'the Act') filed by original defendants challenging the correctness, legality and propriety of the judgment Exh.12 dated 21st July, 1999, rendered by the learned Joint District Judge, Jamnagar (In short the learned

Appellate Judge), in Civil Reg.Appeal No.51 of 1999, by which he has confirmed the judgment and decree both dated 19.04.1999 passed by learned Jt.Civil Judge (J.D.), Jamnagar(In short the learned Judge of the trial Court), in Regular Civil Suit No.91 of 1996.

3. This Civil Revision Application is taken up for hearing at the admission stage.

4. It is necessary to know under what circumstances this CRA is filed. The present revision-opponent as per his case, is a landlord of the suit premises which have been leased to revision petitioner No.1. He filed R.C.S.No.91/96 against present revision petitioners in the court of the Jt.Civil Judge (J.D.), Jamnagar, for eviction of the suit premises mainly on the following two grounds:

- (1) that defendant No.1 who is tenant of the suit premises, has become tenant in arrears of rent for more than six months i.e. ground falling under sec.12(3)(a) of the Act, and
- (2) that defendant No.1 has sublet the suit premises to defendant no.2 i.e. ground falling under sec.13(1)(e) of the Act.

In that suit, the plaintiff also prayed for a decree to recover an amount of Rs.800/- being the rent which had become due. In that suit, defendants appeared and contested the suit by filing a joint written statement Exh.14 whereby they denied the pleadings of the plaintiff pleaded in plaint. The learned Judge of trial Court framed issues at Exh.19 on the basis of pleadings of both the parties. In that suit, both the parties led oral as well as documentary evidence. After hearing the arguments of the learned advocates of both the parties and after appreciating the evidence of both the parties, the learned Judge of the trial court accepted the case of the plaintiff so far as case of subletting of suit premises by defendant no.1 to defendant no.2 is concerned and on that ground he was pleased to pass a decree directing the defendants to handover the possession of the suit premises to plaintiff on or before 31st May, 1999.

Being aggrieved against and dissatisfied with the said judgment and decree both dated 19th April, 1999, passed in Regular Civil Suit No.91 of 1996, the defendants-tenants preferred Civil Regular Appeal No.51/99 in the court of the Joint District Judge,

Jamnagar. The learned appellate Judge, after hearing the arguments of both the parties and after perusing the record and proceedings of the suit, by dismissing the said appeal, confirmed the judgment of the trial court.

As against that judgment of the appellate court rendered in Regular Civil Suit No.51/99, the original defendants-tenants have preferred this present Civil Revision Application.

5. In this matter, on 09-08-1999 the original plaintiff-landlord who was respondent in Reg.Civil Appeal No.51/99 filed a caveat and therefore he is present before the court. Today this matter is taken up for hearing at the admission stage.

6. Mr.R.C.Kakkad, learned advocate for the revision petitioners has advanced three grounds to assail the judgment saying that judgment of the appellate Court is "not according to law".

7. First that plaintiff Savjibhai Becharbhai is not a landlord and that he is merely a rent collector. By referring rent note Exh.32, he has argued that infact Smt.Jaswanti Damji was a landlady whereas Savjibhai Becharbhai i.e. plaintiff who has filed the suit is merely a rent collector. On the basis of this rent note, he has argued that plaintiff has no right to file the suit, and for this he has cited one Full Bench authority of this Court in the case of Nanalal Girdharlal and Another Vs. Gulamnabi Jamalbhai Motorwala and others reported in 1972 Vol.13 G.L.R. page 880 wherein it has been held that extended meaning of the word 'landlord' cannot be projected into sec.12 and sec.13(1) and further that the landlord referred to in sec.12 and 13(1) is not a landlord as defined in sec.5(3) but a landlord who is entitled the possession of the premises on determination of the tenancy under the ordinary law of landlord and tenant. By citing this authority Shri Kakkad argued that plaintiff has no right to file the suit and the suit is not maintainable and, therefore, he argued that this is a legal point which is required to be considered in this civil revision application.

8. It may be noted that both the defendants have filed their joint written statement Exh.14 dated 22.3.97 in the suit. In this written statement, no such contention has been taken that present plaintiff who has filed the suit has no right to file the suit. As there was no plea before the trial court, obviously trial court cannot frame any issue on that point. After the defendants coming to know this legal position they ought

to have requested the trial court to frame a particular issue with regard to maintainability of the suit on the ground that plaintiff has no right to file the suit as he is a mere rent collector. For a moment, if it is believed that the learned advocate for the defendants who appeared before the trial court, did not care for this type of issue being framed by requesting the trial court, then the defendants, when they filed Regular Civil Appeal before the appellate Court, could have taken a ground on that point in memo of appeal and requested the appellate Court to decide the point though it was not agitated before the trial court.

9. Shri Kavina, learned advocate for the revision opponent has drawn attention of sec.105 of CPC to this Court. In view of sec.105 of CPC, the defendants-tenants could have taken a ground of objection in the memorandum of appeal. We do not find such contention in the memorandum of appeal preferred by defendants-tenants. In case of Bakarali Fatehali and others Vs. Mohammed Kasam Haji Gulambhai reported in 1996(1) G.L.R. p.96 this Court by following the case of Gauri Shanker Vs. M/s. Hindustan Trust (Pvt.)Ltd. and others reported in 1972 S.C. 2091 held that raising a point in the memorandum of appeal is not sufficient to show that the point was argued or pressed before the appellate Court and the statement in the judgment that no such point was argued is prima facie to be accepted. Here in this case admittedly no contention was taken in memorandum of appeal and therefore contention with regard to maintainability of the suit on the ground that plaintiff has no right to sue is deemed to have been given up by the appellants.

9.1 Mr.Kavina, learned advocate has cited one another authority in case of Jenusan Textile and others Vs. Rajkot Municipal Corporation and others reported in 1999(1) GLH p.532 wherein the Division Bench of this Court has held in para 3 as follows:

"Ld.Counsel Mr.Panchal urges before us that, when various contentions have been taken in detail in the memorandum of the petitions, it would be open for the appellants to urge the said contentions before us, even though not urged before, and not dealt with, by the Ld. single Judge. We are unable to agree with this contention coming from the Ld.Counsel for the appellants, for the simple reason that, the voluminous petitions might be containing numerous contentions but ultimately at the time of advancement of the cause before the

Court, if only a few of them or only one of them is advanced for the consideration of the judicial conscience and, if the orders are based upon that contention alone, in our opinion, it would not be open for the appellants to urge other contentions before the Bench taking up the L.P.A.s. This is precisely so because of the reason that the judicial conscience at the relevant time was called upon to decide only some or one of the numerous grounds taken in the memorandum of the petitions. Putting the same in other words one can say that the orders are based upon only some or one of the contentions canvassed in the memorandum of the petitions and that, qua the other contentions, there is absolutely no judicial scrutiny and therefore no judicial opinion or a verdict. We, therefore, in the present group of appeals are not inclined to examine other contentions raised in the memorandum of appeals which were in fact not advanced for consideration before the Ld. single Judge."

In view of above legal position if no contention was taken in the memorandum of appeal before the Single Judge in LPA that contention was not allowed to be taken by this Court. That was the case of appeal. This is a case of revision. The scope of revision is very much limited and circumscribed in comparison to an appeal and, therefore, the contention which has not been taken either in written statement filed in the suit or in memorandum of appeal when appeal was filed, cannot be agitated in this revision court.

10. Second contention which is taken by Mr.R.C.Kakkad is to the effect that landlady Smt.Jaswanti Damji expired in 1986 and the suit was filed in the year 1996 and therefore only heirs and legal representatives of said landlady can file a suit and therefore suit is bad for non-joinder of parties. This type of contention is taken in the memorandum of this civil revision application but no such contention was ever taken in appeal memo. As per his arguments, such contention can be raised at any stage in revisional court. As discussed earlier, when there is no plea and when there is no issue on that point, the trial court was not required to give finding on the point which is agitated for the first time before this Court.

10.1 Shri Kavina has cited an authority of Sri Ram Pasricha Vs. Jagannath and others reported in AIR 1976 S.C. 2335 wherein it is held that domain of the frame of

the suit as if the suit is bad for non-joinder of other plaintiffs, such a plea should have been raised, for what it is worth at the earliest opportunity. In that cited case it was not done and therefore in that case the tenant for this type of suit was estopped from questioning the title of the landlord under Section 116 of the Evidence Act. The tenant cannot deny that the landlord had title to the premises at the commencement of the tenancy. At the end, it was held that, it is inconceivable to throw out the suit on account of non-pleading of other co-owners as such.

10.2 Here in this case there is no plea before the trial court as well as the appellate court with regard to non-joinder of heirs and legal representatives of the deceased landlady and therefore this contention cannot be accepted and on that count it cannot be said that the judgment is not according to law.

11. The third contention is with regard to fulfilling of two conditions to prove the case of plaintiff for subletting. Mr.Kakkad has cited authority in case of Popatlal Premchand Sheth (Since Decd.) through His heirs Dinesh Popatlal Sheth and others Vs. M/s.Dhanjibhai & Sons reported in 1994(1) GLR p.71. In para 6 it is held that, in order to prove sub-letting the landlord had to establish two vital facts, namely, transfer of exclusive possession of the rented premises or any part thereof and valuable consideration for such transfer. The learned appellate Judge has observed that the plaintiff has proved that the possession of the suit shop is transferred by defendant No.1 to defendant No.2 and defendant No.2 is in exclusive possession of the suit shop. This finding is arrived at by the learned appellate Judge after considering the evidence led by both the parties and therefore first condition is fully satisfied by the landlord. On the point of second condition, it is argued by Mr.Kakkad that the plaintiff has not proved that said transfer of suit premises was for consideration. As per his argument, the defendant No.2 is an employee of defendant No.1 and he is being paid Rs.70 to Rs.80 per day as daily wages. The learned appellate Judge has not accepted that defence on the ground that there is no written agreement between defendant no.1 and defendant no.2. Defendant no.2 had deposed that he is keeping accounts of work but thereafter he turned his deposition stating that there is no written account of the business. The learned appellate Judge has after analysing the evidence and appreciating the evidence did not accept the defence of the defendant no.2.

11.1 Defendant no.2 has deposed that he is paying Rs.2,000/- to Rs.3,000/- to Nitishbhai. Admittedly defendant no.1 who is the tenant is not residing in India. He is out of India at Kenya since last 11 years. Nitishbhai who is his son has also left India for Kenya and therefore it is necessary for defendant no.2 to prove as to how he is remitting Rs.2,000/- to Rs.3,000/-p.m. to Nitishbhai who is admittedly at Kenya. A person from India cannot remit money without the permission of the Reserve Bank of India under the provisions of FERA. There must be some documentary evidence to show that defendant no.2 was remitting an amount of Rs.2,000/to Rs.3,000/- to Nitishbhai son of defendant no.1, every month and, therefore, whatever defence advanced by defendant no.2 was negatived by the appellate Judge. He has come to such conclusion after appreciating the evidence.

12. The scope of civil revision application is very much limited. In case of Patel Valmik Himatlal and others Vs. Patel Mohanlal Muljibhai (dead) through LRs., reported in (1998) 7 SCC 383 equivalent to AIR 1998 S.C. 3325, the Hon'ble Supreme Court has held that powers under Sec.29(2) of the Act are revisional powers with which the High Court is clothed. It empowers the High Court to correct errors which may make the decision contrary to law and which errors go to the root of the decision but it does not vest the High Court with the power to rehear the matter and reappraise the evidence. The mere fact that a different view is possible in reappraisal of evidence cannot be a ground for exercise of the revisional jurisdiction and the High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on reappraisal of evidence.

12.1 When there is a consistent and concurrent findings on case of sub-letting (i.e. under sec.13(1)(e)) given by both the Courts below based on evidence, now this revision court cannot reappraise the evidence and come to the different conclusion as argued by Mr.Kakkad.

12.2 On the point of subletting for consideration, Mr.Kavina has cited an authority in case of Bhagwati Spg. & Wvg. Works Vs. Ahmedabad New Cotton Mills Co. Ltd. reported in 1979(20) GLR 932 wherein it is held that to decide as to whether there was existence of valuable consideration for transferring the suit premises, it is extremely difficult for a landlord to prove the fact that

there was valuable consideration between the tenant and sub-tenant, particularly when the act of sub-letting produces the serious consequences under the Act. A fact for that second contention with regard to valuable consideration can be proved by inference. Here in this case on hand defendant no.2 is in exclusive possession of the suit premises. Original tenant and his son both are residing abroad since many years. The defendant no.2 has not led any evidence to show that he is an employee of the defendant no.1 and, therefore, the learned appellate Judge has rightly drawn some inferences against defendant no.2.

13. Thus considering the judgment of the appellate Court on the points agitated by Mr.Kakkad, here in this civil revision application, it cannot be said that it is 'not according to law'. The learned appellate Judge has rightly appreciated the evidence keeping in mind the well settled principles of law with regard to sub-letting. When there is a consistent and concurrent findings both on facts and law of the courts below, this Revisional Court cannot rehear the matter and reappraise the evidence and come to a different conclusion and therefore this revisional Court finds that the judgment rendered by appellate Court is not required to be disturbed. This Civil Revision Application is devoid of merits and therefore it deserves to be dismissed and accordingly this revision is dismissed at the admission stage. Notice is discharged.

Ad-interim relief granted earlier stands vacated. The original defendants are ordered and directed to hand over the physical possession of the suit premises within four months from the date of this order provided they furnish undertaking with usual terms and conditions supported with affidavits to this court, within 15 days from date of this order.

29.06.2000 (Per: H.H.Mehta,J.)

Mr.R.C.Kakkad, learned advocate for the revision petitioners submits that operation of the final order passed in judgment of this civil revision application be stayed for some reasonable period so that he can move the appropriate higher forum to challenge the order. Heard Mr.Kavina, learned advocate for the revision opponent also. Looking to the request made by Mr.Kakkad, operation of the final order passed in this civil revision application is stayed for a period of four weeks with effect from 1st July, 2000.

(H.H. Mehta, J.)

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